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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

This motion for reconsideration of defendant Adam Shafi's previous motion for pretrial release addresses the issue about which the Court expressed its concern during the January 14, 2016, hearing and in its subsequent January 14, 2016, Minute Order (Docket #41): Mr. Shafi's conditions of confinement.

1 As detailed below, the January 29, 2016, submission from the Alameda County
2 Sheriff (Application of Nonparty Alameda County Sheriff's Office Regarding
3 Questions Concerning the Glenn E. Dyer Jail and the Confinement of Defendant Adam
4 Shafi, Docket #46) (hereinafter "the County") confirms that Mr. Shafi is in solitary
5 confinement – notwithstanding any linguistic spin attempted by the County – and that
6 circumstance is not going to change during the pendency of this case.

7 As the Court told the government during the January 14, 2016, hearing, that is
8 "not tenable," and, as a result, it is respectfully submitted that the Court should
9 reconsider its decision denying Mr. Shafi pretrial release, and grant him bail pursuant to
10 the stringent conditions proposed in Mr. Shafi's earlier application.

11 In its Minute Order, the Court invited Mr. Shafi's counsel "to schedule an earlier
12 hearing [than March 17, 2016] concerning the conditions of Mr. Shafi's confinement if
13 appropriate[,]" because, "[d]epending on the explanation [by the County] and further
14 pleadings of counsel, the Court may revisit the possibility of some alternative
15 confinement." *Id.*, at 2.

16 In addition, in order to provide the Court a greater degree of confidence in the
17 efficacy of those multifaceted conditions, this motion for reconsideration will also
18 provide evidence from the recorded telephone conversations that occurred the day *after*
19 Mr. Shafi was stopped by authorities at the San Francisco Airport, and which manifest
20 his clearly expressed intention *not* to make another attempt to travel overseas.

1 Accordingly, it is respectfully submitted that the County’s “explanations” are
 2 simply and completely inadequate to allay any of the Court’s concerns about Mr.
 3 Shafi’s conditions of confinement. Rather, the County’s submission merely amplifies
 4 those concerns, and make release on bail the only acceptable alternative.

5 **I. *The County’s Submission Confirms That Mr. Shafi Is In Solitary***
 6 ***Confinement, and That the County Will Not Alter Mr. Shafi’s Conditions of***
Confinement.

7 The County’s submission, often defiant, frequently conclusory, and materially
 8 self-contradictory, confirms that Mr. Shafi has since December 18, 2015, been subject
 9 to solitary confinement that has been repeatedly reinstated in a series of “reviews,” and
 10 which offers no prospect for change during the pendency of Mr. Shafi’s case.

11 The County’s submission is also entirely tone-deaf to the concerns expressed by
 12 the Court in its January 14 2016, Minute Order (Docket # 41), and completely misses
 13 the point of Mr. Shafi’s request for relief: not to compel the County to do anything, but
 14 rather that because of the County’s arbitrary treatment of Mr. Shafi, and its
 15 intransigence that precludes the possibility for amelioration of Mr. Shafi’s conditions of
 16 confinement, pretrial release on bail is the only viable alternative. In that context, the
 17 County’s submission makes Mr. Shafi’s point convincingly.

18 **A. *Mr. Shafi Is In Solitary Confinement Regardless of the Nomenclature.***

19 In insisting that Mr. Shafi has erroneously described his detention status as
 20 “solitary confinement,” the County would take the Court through the looking glass,
 21

1 insisting that a defendant who is confined by himself in a small cell 24 hours a day,
 2 except for one hour five days each week, when he is allowed out of his cell (but still
 3 alone) is *not* in “solitary confinement” because the County calls it something else:
 4 “administrative isolation.” *See* County Submission, at 2 (“‘administrative isolation’ is
 5 not ‘solitary confinement’”), citing the Declaration of Lieutenant Dan Brodie (“Brodie
 6 Declaration”), Administrative Lieutenant at Alameda County Sheriff’s Office
 7 (“ACSO”) and stationed at the Glenn E. Dyer Jail (“Glenn Dyer”).¹

8 According to the County, “[t]he major distinction between solitary confinement
 9 and Administrative Isolation is that the former is a housing assignment based on
 10 punishment, while the latter is a housing assignment based on classification.” *Id.*, at 4,
 11 *citing* Brodie Declaration. The County adds that “[i]n the case of Defendant, he was re-
 12 classified to the Administrative Isolation housing unit after both his criminal complaint
 13 and name became public.” *Id.*²

14 That unavailing exercise in semantics has been dispository repudiated by Judge
 15 Alex Kozinski, who, in an essay in the *Yale Law Journal*, noted that “[y]ou can call it
 16

17 ¹ *See* Lewis Carroll, *Alice’s Adventures In Wonderland*, (1865) (“‘[w]hen I use a word,’
 18 Humpty Dumpty said in a rather scornful tone, ‘it means just what I choose it to mean – neither
 more nor less’”).

19 ² The County cites as dispository its “accommodation” to Mr. Shafi “when ACSO allowed the
 20 Defendant to move to a different cell so he could look at the clock in order to know when to
 pray in accordance with his religion[,]” without any substantive alleviation of his conditions.
See County Submission, at 4.

1 administrative segregation or special housing or a long walk on a sandy beach. But it
 2 will always be the box.” Alex Kozinski, *Worse than Death*, 125 YALE L.J. F. 230
 3 (2016), available at <<http://www.yalelawjournal.org/forum/worse-than-death>> (“*Worse*
 4 *Than Death*”).

5 As Judge Kozinski points out, “we hear remarkably little about what may be the
 6 most severe punishment of all: solitary confinement. Lurking in the shadows of the
 7 conversation about inhumane punishments are some 100,000 souls who spend 23 hours
 8 a day alone in a cell the size of a parking space.” *Id.*³

9 As a result, Judge Kozinski urges that “we should all be asking more questions
 10 about how prisoners get into solitary confinement, what ‘life’ is like once they get there,
 11 and how they can get out.” *Id.* Judge Kozinski also cites Yale Law School’s *The Liman*
 12 *Program’s Time-In-Cell Report*, and its “shuddersome findings confirm what I have

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 14
 15 ³ The County claims as a material distinction the federal regulations that provide an inmate in
 16 solitary confinement one hour outside his cell five days each week. Yet the government merely
 17 cites the regulation, and does not affirmatively state that Mr. Shafi has been afforded those five
 18 hours each – as those same regulations provide exceptions. *See* County Submission, at 2, 5
 19 [citing “Federal Performance Based Detention Standards, C.9.25 (“Inmates in special
 20 management units receive a minimum of one hour of exercise per day outside their cells, *five*
 21 *times per week*, unless security or safety considerations dictate otherwise. 4-ALDF-2A-64”)
 (emphasis added by County)]. Indeed, the County has deprived Mr. Shafi of some of that time
 based on its policy with respect to visits. For example, defense investigator Scott Dudek has
 reported to counsel that his visits to Mr. Shafi are treated as social visits and are therefore
 counted as time out of his cell (and therefore diminish that five-hour total per week
 accordingly).

1 long suspected: Solitary confinement is just as bad as the death penalty, if not worse.”

2 *Id.*

3 As a result, in comparing solitary confinement to capital punishment, Judge
4 Kozinski concludes that the former “merely swaps one type of death for another.” *Id.*

5 As Judge Kozinski explains,

6 man is a social animal. The human mind craves interaction
7 with other people, and being deprived of human
8 companionship is as damaging to the psyche as deprivation
9 of food and water is to the body. Psychologists now
10 understand that “much of who we are depends on our
11 contact with other people, the social context in which we
12 function, and when you remove people from that context,
13 they begin to lose their very sense of self.”

14 *Id.*, citing Maclyn Willigan, “What Solitary Confinement Does to the Human Brain,”
15 *Solitary Watch* (Aug. 4, 2014), available at <<http://perma.cc/B5MB-F4LC>>.

16 Judge Kozinski also mentioned Justice Anthony Kennedy’s recent concurrence
17 in *Davis v. Ayala*, 135 S.Ct. 2187, *reh’g denied*, 136 S.Ct. 14 (2015), which noted that
18 “despite scholarly discussion and some commentary from other sources, the condition in
19 which prisoners are kept simply has not been a matter of sufficient public inquiry or
20 interest.” Judge Kozinski further pointed out that Justice Kennedy emphasized that
21 “consideration of these issues is needed” because “so stark an outcome [as solitary
confinement] ought not to be the result of society’s simple unawareness or
indifference.” 135 S.Ct. at 2209, *reh’g denied*, 136 S.Ct. 14 (2015).

1 Similarly, only last week President Barack Obama, in an Op-Ed article published
 2 in *The Washington Post*, announced executive actions designed to limit solitary
 3 confinement in the federal prison system. *See* Barack Obama, Op-Ed, “Why We Must
 4 Rethink Solitary Confinement,” *The Washington Post*, January 25, 2016, available at
 5 <<http://wapo.st/1ZONjUV>>.

6 In that article, in which the President characterizes solitary confinement as “an
 7 affront to our common humanity[,]” and which should be “[u]sed only as a measure of
 8 last resort[,]” he explained that

9 [r]esearch suggests that solitary confinement has the
 10 potential to lead to devastating, lasting psychological
 11 consequences. It has been linked to depression, alienation,
 12 withdrawal, a reduced ability to interact with others and the
 13 potential for violent behavior. Some studies indicate that it
 14 can worsen existing mental illnesses and even trigger new
 15 ones. Prisoners in solitary are more likely to commit
 16 suicide, especially juveniles and people with mental
 17 illnesses.

18 *Id.*

19 Judge Kozinski also reflected on the impact of solitary confinement:

20 [g]iven these conditions, it should come as no surprise that
 21 “incarceration in solitary cause[s] either severe exacerbation
 22 or recurrence of preexisting illness, or the appearance of an
 23 acute mental illness in individuals who had previously been
 24 free of any such illness.”

25 *Id.*, citing Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 Wash. U. J.L.
 26 & Pol'y 325, 333 (2006).

1 Indeed, Judge Kozinski stated that “[t]he empirical literature on the effects of
 2 solitary confinement is horrifying[,]” *id.* (footnote omitted), and “shows that prisoners
 3 exposed to solitary confinement become verbally and physically aggressive;[] develop
 4 fantasy worlds and other paranoid psychoses;[] and grow anxious, withdrawn, and
 5 hopeless.[”]” *Id.* (footnotes omitted).⁴

6 Also, dispelling the notion that the detrimental impact of isolation occurs only
 7 after years of confinement, about a third of the responsive jurisdictions contained in the
 8 Liman-ASCA 2014 National Survey indicated that a majority of prisoners were held in
 9 administrative segregation for less than 90 continuous days, with another third reporting
 10 that a majority were held in administrative segregation between six months and one
 11 year. Liman Report, at 28. Indeed, the “Mandela Rules,” as the United Nations
 12 Standard Minimum Rules for the Treatment of Prisoners are known, define “prolonged
 13 solitary confinement” as exceeding only “15 consecutive days.” *Id.*, at 7.

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15 ⁴ Given the Pre-Trial Services Report’s concern regarding Mr. Shafi’s “depression coupled
 16 with suicidal ideation” (Dkt. 35 at 8), the literature and statistics regarding the incidence of
 17 suicide in the context of solitary confinement are deeply ominous in this case. As Judge
 18 Kozinski related,

19 [o]ne early study found that nearly all of the prisoners in Maine’s
 20 isolation unit had either contemplated or attempted suicide.[
 21 One attempted to swallow the glass from the light bulb in his
 22 cell.[
 23 Another tried twice to hang himself with a sheet.[
 24 More
 25 recent data suggests that prisoners in solitary are five times more
 26 likely to kill themselves than those in the general population.[

27 *Id.* (footnotes omitted).

1 Mr. Shafi's age – 22 – is also a factor. The Liman-ASCA 2014 National Survey
 2 notes that various “correctional initiatives . . . policies; statutes and regulations;
 3 legislative reports and hearings,” among other things strongly indicate that young
 4 people – “juveniles under the age of 21” – are particularly vulnerable to the effects of
 5 the isolation inherent in administrative segregation. Liman Report, at 6.

6 In addition, as President Obama added in his Op-Ed, the adverse impact of
 7 solitary confinement endures: “[t]hose who do make it out often have trouble holding
 8 down jobs, reuniting with family and becoming productive members of society.” *See*
 9 *also* “From Solitary to the Street,” *The Marshall Project*, June 11, 2015, available at
 10 <https://www.themarshallproject.org/2015/06/11/from-solitary-to-the-street?utm_medium=s#.rMXkGO3fm> (describing the difficulties of resuming a normal
 11 life after extended solitary confinement).

13 Here, Mr. Shafi faces the same prospect, although in a far more critical and
 14 immediate context – indeed, imagine him making a decision whether to testify – his first
 15 authentic social encounter in months, before twelve strangers who would decide his
 16 future – after enduring pretrial confinement in isolation.

17 B. ***The County’s “Periodic Review” Is a Formality That Ensures That Mr.***
Shafi Will Remain In Solitary Confinement for the Duration of the
Pretrial Stage.

19 The County’s submission also establishes that the conditions of Mr. Shafi’s
 20 pretrial confinement will not be changed. Indeed, the County enumerates *seven* weekly
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1 reviews in which Mr. Shafi's status has been reaffirmed without any hint of substantive
 2 re-evaluation. *See* Brody Declaration at ¶¶ 13-19.⁵ *See also* County Submission, at 3
 3 ("[f]ollowing numerous weekly reviews regarding the classification status of the
 4 Defendant, Defendant continues to be held in Administrative Isolation for his safety,
 5 with his last review being held on January 25, 2016"), *citing* Brody Declaration.

6 According to the Brody Declaration, the reason for the continued placement of
 7 Mr. Shafi in isolation is a simple mantra: "[d]ue to the nature of his case staff
 8 determined his placement in Administrative Isolation would Continue." *See* Brody
 9 Declaration at ¶¶ 15, 17, 19. Other conclusory, repeated rationales include the case's
 10 "high profile" and Mr. Shafi's "safety." *Id.*, at ¶¶ 13, 14, 19.⁶

11 This perfunctory "review" holds little if any hope for an adjustment of Mr.
 12 Shafi's conditions pending trial. In fact, Judge Kozinski commented in his essay that
 13 "the 'process' afforded to those in solitary confinement seems paltry indeed." *See*
 14 *Worse Than Death*. He added that "[t]he most important contribution of the [Liman]

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 17⁵ An eighth such review presumably occurred this past Monday, February 1, 2016, after the
 County filed its submission.

18⁶ Among the executive actions by President Obama concurrent with publication of his January
 19 25, 2016, Op-Ed piece was a limitation of 60 days on solitary confinement as punishment for
 first offenses. *See* Report and Recommendations Concerning the Use of Restrictive Housing,
 20 U.S. Department of Justice, January 25, 2016, available at
 <<http://www.justice.gov/restrictivehousing>>. Here, Mr. Shafi's tenure in solitary will exceed
 21 60 days, February 17, 2016, the day before the hearing on this motion.

1 Time-In-Cell Report may be its finding that prison administrators have breathtaking
 2 latitude in imposing housing restrictions.” *Id.*

3 As a result, according to Judge Kozinski, “the general story is about what you’d
 4 expect: It’s easy to get into solitary and hard to get out.” *Id.* (footnote omitted). See
 5 also Aymann Ismail and Leon Neyfakh, “Doing Time In Solitary Is Unimaginably
 6 Hard. Getting Out Might Be Harder,” *Slate.com*, February 3, 2016, available at
 7 <http://www.slate.com/articles/news_and_politics/crime/2016/02/is_solitary_confinement_torture_former_inmates_on_life_in_isolation.html>

9 Here, the “periodic review” process undertaken by the County confirms that
 10 conclusion. Moreover, the County’s failure to provide any prospect of alteration of Mr.
 11 Shafi’s conditions ignores entirely the Court’s admonition that “if defense counsel has
 12 accurately portrayed” the conditions of Mr. Shafi’s confinement, “some of what has
 13 been described is not acceptable and such a limited ability to interact with others does
 14 not seem tenable for the duration of a fairly lengthy anticipated pretrial period.” Minute
 15 Order, at 1 (Docket #41).

16 The County’s Submission also takes contradictory positions with respect to the
 17 reason for placing Mr. Shafi in isolation – yet neither excuse is supported by the record.
 18 For instance, according to the County, after Mr. Shafi’s December 17, 2106,
 19 arraignment, “the federal criminal charges against Defendant became public and were
 20 picked up by the local and national media.” County Submission, at 3 (citation omitted).

1 Subsequently, “[o]n 18 December 18, 2015, based on further review and the high
 2 profile media coverage of his case (and other factors, including items found within his
 3 cell during a routine search), the classification unit at the Jail determined it would be in
 4 the best interest of Defendant’s safety to be reclassified to “Administrative Isolation”
 5 *due to the risk of Defendant being assaulted due to the nature of his case as it became*
 6 *public information among other inmates in mainline custody.”* *Id.* (emphasis added).

7 *See also* Brodie Declaration, at ¶ 11.

8 Explaining that decision, the County maintains that “[t]his was done to protect
 9 the Defendant – not as punishment, nor discrimination[,]” and that quite often the
 10 ACSO utilizes Administrative Isolation to protect inmates while awaiting trial in jail.”
 11 *Id.*, at 4.

12 Nevertheless, the County’s actions were without any foundation. Mr. Shafi had
 13 been at Glenn Dyer for six months already, and the inmate population was well aware of
 14 the charges against him in the Complaint. Nor does the County cite a single threat
 15 directed at Mr. Shafi.

16 Indeed, the County notes that the day of the arraignment
 17 ACSO staff met with Defendant and advised him of their
 18 concern for his safety because of the media release of
 19 information concerning his case, including his identity.
 20 Defendant told ACSO staff he did not want to be moved,
 21 and Defendant was advised to speak to a deputy if he felt
 threatened or the situation changed.

County Submission, at 3. *See also* Brodie Declaration, at ¶ 7.

1 The County adds that “[i]n further support of re-classifying Defendant to
2 Administrative Isolation, contraband was found in Defendant's cell during a routine
3 search, the nature of which further justified the need to move Defendant into
4 Administrative Isolation.” *Id.*, citing Brodie Declaration, at ¶ 9.

5 Yet the Brodie Declaration fails to identify *any* contraband discovered in Mr.
6 Shafi's cell. Nor has Mr. Shafi been charged with or disciplined for any such infraction.
7 Indeed, the entirety of the cited paragraph from the Brodie Declaration reads as follows:

8 [d]uring the search of Mr. Shafi's cell, a deputy located a
9 notepad containing writings and drawings, which to the
10 deputy, based on this deputy's training and experience,
11 appeared to support terrorism. Copies of these drawings
12 were retained in Mr. Shafi's classification file the original
13 notebook was confiscated and later turned over to the FBI.
14 Brodie Declaration, at ¶ 9.

15 Neither the FBI nor the County have made any further or specific allegations
16 with respect to those materials seized from Mr. Shafi because *they do not in any way*
17 “support terrorism.” Nor have those documents been cited as the continuing basis for
18 keeping Mr. Shafi in solitary confinement (as established by the Brodie Declarations
19 descriptions of the outcome of the sequential weekly “periodic reviews”). Thus, the
20 documents seized from Mr. Shafi are a red herring with respect to his continued
21 placement in solitary confinement.

22 Thus, the County relied on two contrived rationales to place Mr. Shafi in solitary
23 confinement, and has reflexively reimposed that status based on the assertion that it is
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1 for Mr. Shafi's safety. Yet the notion that isolation is required to protect Mr. Shafi is
 2 not only a canard, but constitutes an extreme sanction that punishes Mr. Shafi for being
 3 a potential victim. As *The Washington Post* declared in an Editorial supporting
 4 President Obama's Op-Ed (and executive action) regarding solitary confinement (which
 5 the Editorial describes as "this most barbaric of practices"), while "some prisoners are
 6 in solitary for their own protection[,] . . . [t]hey should not be punished for being at
 7 risk." "Obama Right to Limit Solitary Confinement," *The Washington Post*, January
 8 26, 2016, available at <<https://shar.es/14XOd5>>.

9 **C. *The County's Seizure of Mr. Shafi's Privileged Materials.***

10 In its submission, at 5, the County inexplicably claims that "no privileged
 11 materials were seized from [Mr. Shafi's] cell . . ." *See also* Brodie Declaration, at ¶ 10
 12 (to his knowledge "none of Mr. Shafi's legal documents have been confiscated . . .").
 13 Again, though, that contention is categorically refuted by the facts.

14 In response to that patently ludicrous claim, the defense will submitt to the Court
 15 *ex parte in camera* and under seal material seized from Mr. Shafi's cell and produced by
 16 the government January 26, 2016. Documents Bates-stamped FILTER 00002 through
 17 FILTER 00009, constitute Mr. Shafi's handwritten notes *regarding the intercepted*
 18 *telephone conversations*, a subject matter unmistakably obvious from even the most
 19 cursory review. Yet those documents were seized from Mr. Shafi's cell and provided to
 20 the FBI agents involved in this case, compounding the problem and the County's

1 remarkable insensitivity to Mr. Shafi's rights. *See* County Submission, at 5 n. 6
 2 ("ACSO understands that these materials are with the federal government at this time");
 3 Brodie Declaration, at ¶ 9 (copies of documents seized from Mr. Shafi "were retained in
 4 Mr. Shafi's classification file the original notebook was confiscated and later turned
 5 over to the FBI").

6 Moreover, the County's failure to acknowledge the privileged nature of those
 7 documents is profoundly disturbing because it signifies that none of Mr. Shafi's
 8 privileged documents as the case unfolds, and he assists in preparation of his defense,
 9 are safe from seizure by jail officials and transfer to the prosecution. That, for practical
 10 purposes, eliminates Mr. Shafi's participation in preparing his defense to the Indictment.

11 In an effort to deflect attention from its conduct, the County creates a straw man,
 12 arguing that "there was no agreement or understanding with the federal government to
 13 gain access to Defendant's legal materials." County Submission, at 5, *citing* Brodie
 14 Declaration at ¶ 10 and Dkt. No. 38; Dkt. No. 38-1 (the government's January 12, 2016,
 15 response to Mr. Shafi's bail application).

16 Yet the objection is not directed at any "advance agreement" of the County's
 17 intention, but rather that Mr. Shafi's *notes about the evidence in this case* were provided
 18 to the prosecution. Again, the County's unwillingness to acknowledge the problem
 19 provides ample danger that future similar incursions will occur (or, in the alternative,
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1 that Mr. Shafi will abandon participating in the preparation of his defense for fear of
 2 such seizure and disclosure to the prosecutors).

3 **D. *The Interviews of Mr. Shafi By County Mental Health Personnel.***

4 In his January 8, 2016, motion for pretrial release (Docket #35), Mr. Shafi noted
 5 the visits to his cell by two persons who asked him a series of questions, including some
 6 directed at the facts of the case. *See id.*, at 17-18. In its January 13, 2016, opposition
 7 (Docket # 38), the government responded as follows:

8 [t]he FBI's subsequent inquiry of the Glenn Dyer Detention
 9 Facility confirmed that the visitors were not from the
 10 prosecution team (and further indicated that they were not
 11 from the Glenn Dyer Detention Facility).

12 *Id.*, at 7. *See also* January 11, 2016 Declaration of FBI Special Agent Christopher
 13 Monika (Exhibit 1 to the government's January 13, 2016, opposition, Docket # 38-1), at
 14 ¶ 5(c) ("[r]egarding the visit by the two persons claiming to be medical professionals,
 15 these visitors were not from either the [Glenn Dyer] Facility or the FBI").⁷

16 Subsequently, during the January 19, 2016, conference call between defense
 17 counsel,⁸ Assistant United States Attorney Jeffrey Shih, and several representatives of
 18 the County, those County officials' – who, as demonstrated by the government's

19 ⁷ After receiving the government's response, Mr. Shafi's counsel asked AUSA Shih for the
 20 identity of the visitors, and the County's mental health professional practice (*i.e.*, whether it
 21 was conducted by contractors).

8 Both Joshua L. Dratel, Esq., and Erik B. Levin, Esq., were on the call on Mr. Shafi's behalf.

1 January 13, 2016, opposition, had been on notice of the visits since early January –
 2 initial reaction was to deny that such visits occurred (based on abstract protocols, *i.e.*,
 3 that visitors would not be brought to an inmate’s cell to conduct any type of interview)
 4 and strongly suggested that Mr. Shafi had invented the encounter altogether.

5 Yet the County in its submission has been forced to concede not only that the
 6 visit (and subsequent visits) occurred, but that it was conducted by County personnel.
 7 *See Declaration of Joan D. Cairns, LMFT (“Cairns Declaration”)* the Behavioral Health
 8 Care Manager at Criminal Justice Mental Health (“CJMH”), employed by the County of
 9 Alameda in its Behavioral Health Care Services (“BHCS”) division.

10 As the County Submission finally admits, “[o]n December 31,2015, two (2)
 11 CJMH medical professionals visited Defendant to do a mental health assessment on
 12 Defendant. [] Defendant was assessed due to the high profile of his case, and the fact
 13 that he has no prior criminal record.” *Id.*, at 6, *citing* Cairns Declaration.⁹

14 Missing from that admission is any explanation why that assessment occurred *six*
 15 *months* after Mr. Shafi was first incarcerated – when the nature of his case and his lack
 16 of prior criminal record were sufficiently evident. Also, the County contends, in its
 17 submission at 6, that “there is nothing in the CJMH notes that discuss the criminal
 18 charges related to Defendant’s case.”

20 ⁹ In his Declaration, Lieutenant Brodie claims that he was first “made aware” of the visits
 21 January 19, 2016. *See* Brodie Declaration, at ¶ 32.

1 Of course, that could very well be the case only because Mr. Shafi refused to
2 answer questions about the case. Also, tellingly absent from the County's submission is
3 any averment from the persons who conducted the interview. Indeed, the Cairns
4 Declaration relies only on the CJMH form, and the interviewers' notes, rather than any
5 affirmative declaration from them that no such questions were asked.

6 Moreover, contradictorily, the County, in its submission at 6 (*see also* Cairns
7 Declaration, at ¶8), concedes that questions are usually asked with respect to the
8 inmate's understanding of the charges against him. However, any questions about the
9 case and charges posed to a 22-year old in the absence of counsel threaten to
10 compromise his Fifth Amend constitutional rights against self-incrimination. Also,
11 evaluations of competency are exclusively for the court to direct, 18 U.S.C. §4241, *et*
12 *seq.*, and not the province of *ad hoc* institutional inquiry by a detention facility.

13 The County's abject lack of responsiveness with respect to this issue, including a
14 wholesale disingenuous dodge in its first response to the prosecution (which was
15 submitted to the Court), and a later obfuscatory stonewall to defense counsel during the
16 subsequent conference call, is most troubling because, again, it demonstrates the
17 County's perception that it is not accountable even to the Court.

18 In the context of the County's other responses – with respect to the nature of Mr.
19 Shafi's confinement and the seizure of his legal materials – Mr. Shafi cannot have any
20 confidence that either his conditions of confinement will ever be evaluated on the
21

1 genuine merits, or that the confidential nature of his communications or constitutional
 2 rights against uncounseled and/or compelled statements will be respected while he is in
 3 pretrial confinement.

4 **E. *The County's Insistence That Mr. Shafi Exhaust His***
 5 ***Administrative Remedies Through the Interminable and Futile***
 6 ***Grievance Process Only Reinforces the Need for Bail for Mr. Shafi.***

7 In citing exhaustion requirements, and the provisions of the Prison Litigation
 8 Reform Act (“PLRA”), 42 U.S.C. § 1997e(a), the County again fails to recognize the
 9 issue presented herein. *See* County Submission, at 2, 7-8. The painfully slow,
 10 byzantine, and historically futile nature of the prison administrative grievance system,
 11 particularly as it relates to challenging placement in solitary confinement, *see, e.g.*,
 12 **ante**, at 10-11, only strengthens Mr. Shafi’s request for relief: that pretrial release is the
 13 proper alternative.

14 By its terms, the PLRA bars federal court actions under 42 U.S.C. § 1983 or
 15 federal laws. 42 U.S.C. § 1997e(a). Mr. Shafi is not bringing a federal court action; he is
 16 asking this Court to exercise its discretion to set conditions of release under 18 U.S.C. §
 17 3142. At issue in this case is whether the pretrial detention conditions imposed upon Mr.
 18 Shafi constitute punishment, violating his due process rights under the Fifth
 19 Amendment. Moreover, if not remedied, the punitive conditions may surely impact Mr.
 20 Shafi’s fundamental constitutional rights to a vigorous defense by an independent
 21 attorney under the Sixth Amendment, and ultimately his right to a fair trial. *See United*

1 *States v. Lopez*, 327 F. Supp. 2d 138, 143-44 (D. Puerto Rico 2004) (noting real mental
 2 and psychiatric impact upon humans subjected to social isolation).

3 However, even assuming *arguendo* exhaustion were a relevant issue, it would
 4 not be in this case, as the County has amply demonstrated that exhaustion of remedies
 5 would be futile, *see, e.g.*, **ante**, at 9-11. A court may excuse the PLRA exhaustion
 6 requirements if pursuing the administrative process would be futile. *See United States v.*
 7 *Basciano*, 369 F. Supp.2d 344, 348 (E.D.N.Y. 2005).

8 “A person lawfully committed to pretrial detention has not been adjudged guilty
 9 of any crime.” *Bell v. Wolfish*, 441 U.S. 520, 536-37 (1979) (noting that the due process
 10 clause prohibits punishing individuals before a formal adjudication of guilt). Indeed, a
 11 pretrial detainee who is placed in segregation as punishment has a right to a due process
 12 hearing. *See Mitchell v. Dupnik*, 75 F.3d 517, 524 (9th Cir. 1996). In evaluating
 13 whether conditions of confinement amount to punishment or are merely inherent
 14 incidents of confinement, the Supreme Court has directed that “absent a showing of an
 15 expressed intent to punish on the part of detention facility officials, the decision
 16 generally will turn on ‘whether an alternative purpose to which [the restriction] may
 17 rationally be connected is assignable for it and whether it appears excessive in relation
 18 to the alternative purpose assigned [to it].’” *Bell*, 441 U.S. at 538, quoting *Kennedy v.*
 19 *Mendoza-Martinez*, 372 U.S. 144, 168-169 (1963). Where administrative detention is

1 imposed based on the nature of the charges against an inmate, such detention is
 2 punitive. *See United States v. Gotti*, 755 F.Supp. 1159, 1164 (E.D.N.Y.1991).

3 The County has, at times, suggested that it placed Mr. Ilegbameh in isolation
 4 because of the high profile nature of the case. *See ante* at 11-12. “Prison authorities are
 5 not afforded unbridled discretion’ because the detainee is either notorious or
 6 newsworthy or both.” *United States v. Gotti*, 755 F.Supp 1159, 1164 (E.D.N.Y. 1991)
 7 (quoting *Boudin v. Thomas*, 533 F.Supp. 786, 791 (S.D.N.Y. 1982)). In fact, this same
 8 justification was offered by the New York Metropolitan Correction Center (but soundly
 9 rejected by the court) to justify the solitary confinement of John Gotti, the head of the
 10 Gambino crime family. *Gotti*, 755 F. Supp. at 1161-62, 1164-65.

11 In rejecting Gotti’s administrative detention, the district court noted “since the
 12 defendants have been in custody they have committed no act or omission which
 13 suggests that they pose ‘a serious threat to life, property, self, staff, or other inmates, or
 14 to the security or orderly running of the institution[.]’” *Id.*, quoting *Bell*, 441 U.S. at
 15 538. Accordingly, “[t]he inevitable and erroneous conclusion to be reached from that
 16 stated reason [i.e., the nature of the charge] is that every defendant indicted for murder
 17 or witness tampering should be placed in administrative detention.” *Id.* at 1165. If
 18 allowed to impose onerous conditions of confinement based solely upon the nature of
 19 the charge, detainees, like Mr. Shafi are left “completely vulnerable to arbitrary
 20 governmental action.” *Id.* at 1164. Blind deference to “bare invocation[s] of security

1 concerns" should not and cannot be condoned. *See Pierce v. County of Orange*, 526
 2 F.3d 1190, 1211 (9th Cir. 2008). *See also Way v. County of Ventura*, 445 F.3d 1157,
 3 1161 (9th Cir. 2006) ("In effect, they ask us to take security implications on faith. This
 4 we cannot do.")

5 Even if there was evidence to support the County's apparent belief that security
 6 risks warrant more restrictive conditions of confinement, the "ultimate question is
 7 whether the [County's] chosen means – [e.g.,] the indefinite and solitary confinement of
 8 [Mr. Shafi] pending a trial that is unlikely to go forward for at least [many months] – is
 9 reasonably related to its goal" of preventing any perceived harm to the institution or to
 10 Mr. Shafi. *United States v. Basciano*, 369 F. Supp.2d 344 (E.D.N.Y. 2005); *Bell v.*
 11 *Wolfish*, 441 U.S. at 538. It is not.

12 In *Basciano*, the New York Metropolitan Correction Center sought to detain
 13 Basciano, the reputed head of the Bonnano crime family, in isolation pending trial, as it
 14 had in *Gotti*, only this time it had an "indisputably legitimate" reason: to prevent him
 15 from continuing to operate the Bonnano crime family. *Basciano*, 369 F. Supp.2d at
 16 351. The court found the objective to be legitimate because the Bonnano crime family
 17 "has been proven at trial before . . . [the court] to be a violent criminal enterprise . . . that
 18 . . . has not hesitated to order murders to consolidate its own hold on power, to protect
 19 the organization's profits, or to avoid prosecution by government authorities." *Id.*
 20 Nevertheless, the court directed that Basciano be released from administrative isolation
 21

1 after finding that “the government [had] not made a sufficient showing that Basciano
 2 was engaged in planning acts of violence *while* in pre-trial detention.” *Id.* at 352
 3 (emphasis added). The court reasoned, “[w]ithout that nexus to the institutional needs
 4 of the BOP or to the purposes of the Bail Reform Act, there is little or nothing that
 5 distinguishes Mr. Basciano from the hundreds of individuals in pre-trial detention who
 6 are accused of having committed violent acts *before* they were detained.” *Id.*

7 Finally, the County’s insistence on notice and an opportunity to be heard
 8 continue to miss the point entirely: Mr. Shafi does not seek to compel the County;
 9 rather, he seeks the alternative of pretrial release precisely because the County has
 10 demonstrated it will not change his classification, and is incapable of acknowledging
 11 incontrovertible facts (*i.e.*, that Mr. Shafi is in solitary confinement, that the County
 12 seized privileged materials, and that he was visited by persons who failed to identify
 13 themselves properly and conducted an inappropriate interview regarding the case).¹⁰ In
 14 any event, the County has been on notice since early January 2016, as evidenced by the
 15 government’s January 12, 2016, opposition (Docket # 38) to Mr. Shafi’s application for
 16 bail, and nothing prohibits the County from appearing in court to explain itself.

17 Thus, the County’s response to the Court’s concerns, and its persistent
 18 defensiveness in the face of unavoidable facts, merely aggravates the problems
 19

20 ¹⁰ Also, the County’s indignant invocation of “due process” is curious because that is a right
 21 that protects litigants from the *government*, and not vice versa.

1 presented by Mr. Shafi's conditions of confinement, again invoking the capriciousness
 2 of *Alice's Adventures In Wonderland*: "sentence first – verdict later." Here, the only
 3 means of avoiding that injustice is pretrial release for Mr. Shafi pursuant to the very
 4 strict conditions proposed, and any others the Court sees fit to impose.

5 **II. *The Intercepted Recorded July 1, 2015, Telephone Conversation***

6 In its January 14, 2016, Minute Order, in determining that Mr. Shafi constituted a
 7 risk of flight, the Court referenced the recorded intercepted telephone conversations.
 8 Among those conversations, the government cited passages from the July 1, 2015,
 9 conversation – the day *after* Mr. Shafi attempted to fly to Turkey, and two days before
 10 his arrest – between Mr. Shafi and "S.K."

11 Yet that conversation also contains categorical expressions by Mr. Shafi that he
 12 will not again attempt to leave the U.S. For example,

- 13 • at 11:20 in the conversation, Mr. Shafi states "For the whole time I was
 14 there [at the airport], I was like Allah if this is right for me let it happen, if
 15 it's not, then don't let it happen. . . . That's what happened so I got a very
 16 clear . . . I'm 100% sure that I'm not supposed to go there at all, like now
 17 there's no doubt in my heart, I don't even want to go anymore;"¹¹
- 18 • at 14:20 in the conversation, when S.K. asks Mr. Shafi, "You're just
 19 gonna stay here?" Mr. Shafi answers, "What else am I gonna do? What
 20 am I gonna do?"
- 21 • at 15:55 in the conversation, Mr. Shafi states, "After this it was like, I just
 22 have no idea what to do now, I don't think I should have done that. . . I

¹¹ "Allah" is simply the Arabic (and therefore Islamic) word for God.

1 don't really care about the FBI . . . He [Mr. Shafi's father] was like, how
 2 can we trust you anymore;"

- 3 • at 25:29 in the conversation, Mr. Shafi states "Dude my blood pressure the
 4 whole time since I bought the ticket was so freakin' high it was
 5 unbelievable, it was so high . . . my blood pressure went down when the
 6 FBI called me and I was actually way more relaxed." When asked by
 7 S.K. why he tried to travel, Mr. Shafi answered, "'Cuz I thought that if I
 8 found it [his passport] then that means I need to go, *I don't think I was*
 9 *right, I don't think I was right*, I think I'm just going crazy cuz I don't
 10 know what to do." (Emphasis added);
- 11 • at 28:05 in the conversation, Mr. Shafi states, "I was wrong, I was wrong
 12 to go . . . I don't know what I was thinking, that's definitely, it's definitely
 13 completely erased it, I don't even want to think about it, I guess it had to
 14 happen for me to stop thinking about it;"
- 15 • at 29:47 in the conversation, Mr. Shafi tells S.K. that "The reason I'm, I'm
 16 not iffy about going with you because of FBI, because of my parents,
 17 they'd freakin' get destroyed so much, my dad's blood pressure, I think I
 18 would have killed him if I'd stayed longer, he only knew for a couple
 19 hours, he's like had to take so much medicine, damn if I go my parents are
 20 gonna freakin die, I just don't know what the freakin hell to do, I'm so
 21 confused;" and
- 22 • at 40:42 in the conversation, Mr. Shafi, in the context of discussing travel,
 23 states "I'm not gonna just do anything like that anymore, it's gonna
 24 freakin' kill them, they have to know from now on."¹²

25 Thus, the July 1, 2016, conversation includes several expressions by Mr. Shafi
 26 that not only provide evidence that he had decided not to attempt further travel, but that

27
 28
 29 ¹² At 41:30 in the conversation, Mr. Shafi and S.K. also discuss their parents' lack of
 30 understanding of their distress regarding the refugee situation in Turkey – with S.K. noting Mr.
 31 Shafi's parents' good intentions with respect to attempting to distract Mr. Shafi and reduce his
 32 stress by taking him to Disneyland – and discuss planning a hiking trip to Yosemite National
 33 Park in order to relax.

1 the prospect of his parents' suffering (which would be amplified manifold if Mr. Shafi
2 absconded from pretrial release) exerts more than sufficient moral suasion to keep Mr.
3 Shafi from traveling if he is granted bail (particularly in conjunction with the conditions
4 Mr. Shafi has proposed).

5 In that context, Mr. Shafi proposes for the Court's consideration an additional
6 component to that comprehensive package. Daniel Koehler, Director of the German
7 Institute on Radicalization and De-radicalization Studies ("GIRDS"),¹³ and who has
8 recently been appointed by Senior U.S. District Judge Michael Davis (District of
9 Minnesota) as an expert regarding deradicalization options in cases involving
10 allegations of material support for terrorism, has agreed to design, implement, and
11 supervise a program for Mr. Shafi should he be released on bail.¹⁴

12 Such a program would involve techniques and aspects that have been effective in
13 Mr. Koehler's experience, and would include elements directed at decreasing
14 commitment by offering credible alternatives and lowering the perceived invested costs
15 of involvement. One such element would be access to Islamic mentors to foster
16 understanding and critical thinking as well as education regarding different

17
18 ¹³ Information about Mr. Koehler and GIRDS is available at <www.girds.org>.

19 ¹⁴ Mr. Shafi's agreement to participate in such a program does not constitute any admission of
20 any illegal or other conduct charged in the Indictment. Rather, it is designed to address the
Court's expressed concern regarding certain statements made by Mr. Shafi during the course of
the intercepted telephone conversations.

1 interpretations of Islam. The program would be intensive, financed by Mr. Shafi's
2 parents, and include religious, social, educational, and psychological mentoring.
3 Monitoring and reporting requirements would also exist, and could be coordinated with
4 Pre-Trial Services supervision.

5 **Conclusion**

6 Accordingly, for all the reasons set forth above, as well as those set forth in the
7 previous papers filed by Mr. Shafi in support of his application for pretrial release, it is
8 respectfully submitted that Mr. Shafi should be granted bail.

9
10 DATED: February 4, 2016

11 /s/Joshua L. Dratel
12 JOSHUA L. DRATEL

13 ERIK B. LEVIN

14 *Attorneys for Defendant Adam Shafi*

Certificate of Service

I hereby certify that on February 4, 2016, I filed the foregoing **Motion for Reconsideration of Detention Order** with the Clerk of the United States District Court for the Northern District of California by using the CM/ECF system.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 4, 2016.

s/Erik B. Levin
Erik B. Levin, Esq.